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IN THE
COURT OF APPEALS OF INDIANA

JUAN J. VASQUEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0512-CR-1153
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0502-FB-27

October 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Juan J. Vasquez (Vasquez) appeals his convictions of burglary, as a class B felony; residential entry, as a class D felony; and attempted theft, as a class D felony, after a jury trial.[1]

We affirm.

ISSUE

Whether the trial court abused its discretion when it excluded the testimony of defense witness Rodrigo Alberto Perez (Perez).

FACTS

On February 9, 2005, Juan Cortez gave a party at his residence. Juan Cardoza, Vasquez, and Jonathan Orellana and others attended the party. Cardoza borrowed Cortez's truck and left the party with Vasquez and Orellana.

At approximately 3 a.m. on the morning of February 10, 2005, Rafael Aguilera was awakened by noise coming from his basement. He got out of bed to investigate and saw three individuals, one with very bushy hair, go to his detached garage and return toward the residence with a pair of bolt cutters. Aguilera phoned Noblesville police and reported that his residence was being broken into. Officer Michael Friebel arrived and met Aguilera outside of his residence. Aguilera led Officer Friebel to the basement where he had heard noises. As Aguilera entered the basement, he was grabbed by a person, later identified as Cardoza, who placed a gun to Aguilera's head. Aguilera and Officer Friebel were able to get the gun from Cardoza. Once Cardoza was secured, Officer Friebel called dispatch to advise that other suspects may still be in or around the

[1] The trial court merged all of the convictions into the burglary conviction.

residence. A back-up officer arrived and saw two men near the residence; when he activated his lights, the two males ran into the woods. Officer Stanley assisted with K-9 units and tracked the males through the woods but lost them at the edge of the river.

After his arrest, Cardoza identified Orellana and Vasquez as his accomplices in breaking into Aguilera's residence. Aguilera later realized that one of the suspects was Orellana, who he recognized by his unusual bushy hair. Orellana had lived in the basement of Aguilera's residence and worked for Aguilera's roofing business but quit a few weeks prior to the break in.

The jury trial took place on September 19th – 21st, 2005.[2] During the trial, Cardoza testified that Vasquez and Orellana left Cortez's party with him and that they all went to Aguilera's residence where they entered through the basement door. Orellana's child's mother, Yuriko Diaz, testified that "in February, before Valentine's or like a week before Valentine's Day," Orellana and Vasquez arrived at her family's residence at approximately 6:30 or 6:45 a.m. and they both appeared wet. (Tr. 158). Diaz's family's residence is roughly a half- mile from Aguilera's residence.

On September 20, 2005, after the State had rested its case, the trial court conducted a hearing on Vasquez's motion to call a late-discovered witness. The trial court ruled that to add a defense witness "would result in a prejudice to the State and to the presentation of the State's cases and the witnesses that have been called particularly the victim." (Tr. 200).

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[2] Vasquez had informed his attorney the first day of trial that he had a witness in his defense.

On September 21, Vasquez renewed his motion to call a late-discovered witness and made an offer to prove. Pursuant to the offer to prove, Perez would testify that he was in attendance at Cortez's party and while there he overheard a conversation between Cardoza and Cortez. Perez continued that the two discussed a plan to burglarize someone's residence and should they get caught they would blame it on Vasquez or Orellana. Perez said he then witnessed Cortez give Cardoza keys and a gun. Perez was shown the gun that was recovered from Cardoza, which was State's exhibit 1. Perez testified that it looked like the gun he witnessed Cortez give Cardoza. Perez also testified that, after overhearing the conversation, Cardoza gave him a ride home from the party between 11:30 and midnight, in Cortez's truck. At the conclusion of Perez's testimony and pursuant to the offer to prove, Vasquez argued the relevancy of the need to call Perez as a witness.

Vasquez's attorney informed the trial court that he was informed of Perez being a potential witness on the day of jury selection by his client, and that he informed the State the same day. Defense counsel stated to the trial court that non-disclosure of Perez was not purposeful or intentional and "Obviously, communication with my client has been difficult during the time of representation because of the language barrier" (Tr. 223). Vasquez then argued that in order to reduce any prejudice to the State, Perez's testimony should be admitted and a brief continuance be granted to allow the State an opportunity to investigate. Vasquez further argued that the State would not be prejudiced by Perez's testimony because all of the State's witnesses were still under subpoena and could easily be called back for rebuttal testimony. The State responded that it would, indeed, be

prejudiced if Perez were allowed to testify because it did not know anything about Perez and had not had an opportunity to investigate or depose him or to talk with others who had attended the party as to whether they recalled Perez being present. The State concluded that: "the prejudice is extreme" and that the grant of a continuance, after the State has rested its case, would amount to a "mistrial because of the amount of time the State would have to invest in investigating the claims this witness is now making in the middle of trial." (Tr. 225). The trial court then asked the State how much time it would need to conduct an investigation of Perez's testimony. The State said that it would need a minimum of a week. At the close of counsels' argument, the trial court ruled: "I'm finding there would be a substantial prejudice to the State if this witness were permitted to be added to the witness list at this time." (Tr. 228). Vasquez rested. The jury deliberated and found Vasquez guilty as charged.

DECISION

Vasquez argues that the trial court abused its discretion when it excluded Perez's testimony. He offers the cases of: Cook v. State, 675 N.E.2d 687 (Ind. 1996), Williams v. State, 714 N.E.2d 644, 652 (Ind. 1999), and Wiseheart v. State, 491 N.E.2d 985, 991 (Ind. 1986) in support of his position. The State asserts that "the extreme sanction of witness exclusion was proper because substantial and irreparable harm would result to the State if Perez had been allowed to testify." State's Br. 8.

A trial court has broad discretion in ruling on evidentiary matters. Kendall v. State, 825 N.E.2d 439, 448 (Ind. Ct. App. 2005). "Trial courts have the discretion to exclude a belatedly disclosed witness when there is evidence of bad faith on the part of

counsel or a showing of substantial prejudice to the State." Williams v. State, 714 N.E.2d 644, 652 (Ind. 1999). "In light of a defendant's right to compulsory process under the federal and state constitutions, there is a strong presumption to allow the testimony of even late-disclosed witnesses." Id. (citing U.S. Const. amend. 6; Ind. Const. Art. I, § 13). We will reverse a trial court's decision to exclude a witness only upon an abuse of discretion. Kendall, 825 N.E.2d at 448. "An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court." Id. Additionally, "we will find an error in the exclusion of evidence harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights." Williams, 714 N.E.2d at 652.

In Wiseheart, Justice Shepard wrote, "In countless cases this Court has approved the presentation of evidence by the State notwithstanding violations of pretrial orders. Today the shoe is on the other foot." 491 N.E.2d at 988. In Wiseheart, the defendant attempted to call four witnesses that it had not disclosed to the State. The State argued it would be a violation of pretrial discovery to allow the witnesses to testify. The defense argued that a continuance is the proper remedy when there is no evidence of bad faith. The trial court did not find that bad faith existed. Apparently, defense counsel was not aware of the witnesses until the morning of trial; however, the trial court excluded the witnesses. The Court in Wiseheart cited to the cases of Ottinger v. State, 370 N.E.2d 912 (Ind. Ct. App. 1977) and Crocker v. State, 378 N.E.2d 645 (Ind. Ct. App. 1978) in its reversal.

In both of those cases, defense witnesses were excluded due to the witnesses being revealed to the State for the first time at trial. In both cases, this court had found that witnesses that were known to the defense well before trial should be excluded to testify as witnesses at trial. However, for potential witnesses who were not known to defense counsel, the Supreme Court suggested, as guidance to the trial court when considering such an issue, the following list of factors:

> The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State. In order to reach a just decision which fully assesses the right of both parties to a fair trial and the criminal defendant's Sixth Amendment right to present witnesses on his behalf, the following kinds of questions should be asked:
> (1) Whether the nature of defendant's violation was trivial or substantial. The trial court should consider when the witness first became known to defense counsel.
> (2) How vital the potential witness' testimony is to the defendant's case. The trial court should determine the significance of the proffered testimony to the defense. Is the testimony relevant and material to the defense or merely cumulative?
> (3) The nature of the prejudice to the State. Does the violation have a deleterious impact on the case prepared by the State?
> (4) Whether less stringent sanctions are appropriate and effective to protect the interest of both the defendant and the State.
> (5) Whether the State will be unduly surprised and prejudiced by the inclusion of the witness' testimony despite the available and reasonable alternative sanctions (e.g., a recess or a continuance) which can mitigate prejudice to the State by permitting the State to interview the witnesses and conduct further investigation, if necessary.

Wiseheart, 491 N.E.2d at 991.

In Cook, the State provided discovery to the defense. Among the discovered material was a police report with a statement made by Carol Kindler. Although the defense did not name Kindler as its witness, it called her at trial. The State objected and the trial court excluded Kindler – finding that the defense had intentionally failed to

disclose her to the State. Our Supreme Court found that the trial court erred when it excluded her testimony. The Court reasoned that there could have been no substantial prejudice to the State because the State knew of Kindler and her statement. The Court also found that no one alleged bad faith on the part of the defense. The Court found, "Because there is no evidence of bad faith or substantial prejudice, the trial court should not have excluded Kindler's testimony." Cook, 675 N.E.2d at 691. However, the Court found the error was harmless given the great weight of evidence proving Cook's guilt.

In Williams, the defense, without giving the State pretrial notice, attempted to call Brandy White as a witness. The trial court excluded the witness "based on the need for additional time for the State to investigate White and the details of her story, and a scheduling conflict with a juror's planned vacation." Id. Our Supreme Court stated that the issue in Williams "turns on whether the exclusion of White's testimony was compelled by a showing of substantial prejudice to the State." Id. at 651-652. The Court noted that the State was made aware of White's testimony "at the end of the penultimate day of trial." Id. at 652. The Court went on that "[the State] could have interviewed her and investigated at least some details of her story before the conclusion of evidence on the following day. It did not." Id. The Court explained that when there is no evidence of bad faith or of substantial prejudice to the State, a continuance rather than exclusion is the appropriate remedy in this situation. Williams, 714 N.E.2d at 652. In Williams, the Court concluded that neither the State's need to investigate the claim, which it believed the State could have done in an evening, and if not a continuance should have been granted, nor the juror's vacation arose to the level of substantial prejudice. Although, the

Court found the exclusion of the witness to be error, it found that it did not constitute reversible error. The Court concluded that the excluded witness's testimony would have been helpful to the defense; however, evidence presented during trial of the defendant's guilt was overwhelming.

In this matter, the State made no allegation of bad faith to the trial court. However, from our review of the record, the information provided by defense counsel to the trial court was so slight as to not provide the ability to determine whether bad faith existed. However, since bad faith was not alleged at trial, the issue turns on whether the State would have been substantially prejudiced by Perez's testimony.

We find the facts of this case to be distinguishable from Williams and Cook and apply the guidelines of Wiseheart. First, according to the facts, Vasquez alerted his attorney the first day of trial that he had someone to testify on his behalf, although the case had been pending for trial for over six months. The State did not dispute Vasquez's assertion that he only spoke Spanish and getting translation assistance while he was incarcerated was a challenge. The record is unclear whether Vasquez's attorney informed the State that it intended to call Perez or if it was merely a possibility. It would stand to reason that if Vasquez's counsel had intended to call Perez as a witness, he would have immediately brought it to the trial court's attention on the first day of trial. Further, there is no evidence in the record as to why Vasquez waited until the day of trial to inform his attorney about Perez.

Second, on the surface, Perez's testimony appears to be quite important to the defense as it could have been offered to show that Vasquez was being set up by Cardoza and Cortez.

The third matter for consideration is whether Vasquez's violation would have a deleterious impact on the State's case. After Perez's testimony pursuant to the offer to prove, the deputy prosecutor told the trial court that it would need at least a week to investigate Perez's testimony. This case is different from Williams, wherein our Supreme Court found that investigation of the witnesses' testimony would have taken only a short time; however, this case involved a party with an unknown number of people in attendance – a group of people that the State would want to meet with to investigate Perez. Also, it is highly probable that after the State had conducted its investigation, that the defense would also need an opportunity to investigate as well. A minimum of a week's continuance, after the State had rested could have had a negative impact on the jury. It would have been very difficult for the jury to remember and retain the details of the evidence that had been presented. Further, there is no evidence in the record as to whether the jury had been sequestered. Vasquez counters that such a lengthy continuance would not have harmed the jury and referenced other trials that had taken several weeks or months to litigate before a jury reached a verdict. We are unpersuaded and find that the trial court was in the best position to make the decision regarding the prejudice the State might suffer, and to find that for the jury in this matter to have been away from the case for a week and not sequestered would have substantially undermined the State's case. Fourth, in this matter, there appears to be no less stringent sanction that would have

been able to protect the rights of both parties. Finally, because we have concluded that a continuance of a week or more would have substantially prejudiced the State, we find that the trial court did not abuse its discretion when it excluded Perez's testimony.

We affirm.

RILEY, J., and VAIDIK, J., concur.